

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 30 2003

In the Matter of)

Section 272(f)(1) Sunset of the BOC)
Separate Affiliate and Related)
Requirements)

WC Docket No. 02-112

2000 Biennial Regulatory Review)
Separate Affiliate Requirements of)
Section 64.1903 of the Commission's)
Rules)

CC Docket No. 00-175

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF AT&T WIRELESS SERVICES, INC.

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COMMENTS OF AT&T WIRELESS SERVICES, INC.

Pursuant to the Commission's Notice of Proposed Rulemaking, AT&T Wireless Services, Inc. ("AWS") hereby submits its comments in the above-captioned proceeding.^{1/}

INTRODUCTION AND SUMMARY

The Commission seeks comment on the appropriate regulatory classification and regime to govern Bell Operating Companies ("BOCs") (and other incumbent local exchange carriers' ("ILECs")) provision of "in-region, interstate and international interexchange telecommunications services" on an integrated basis.^{2/} AWS urges the Commission to classify BOCs as dominant when providing in-region interLATA services on an integrated basis because they have both market power over the inputs essential to unaffiliated carriers' provision of competing services and a strong incentive to exercise that power in an anti-competitive manner.

^{1/} Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review of Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules, WC Docket No. 02-112, CC Docket No. 00-175, Notice of Proposed Rulemaking, 18 FCC Rcd. 10914 (2003) ("NPRM").

^{2/} NPRM ¶ 1. Although the Commission seeks comment regarding the proper regulatory treatment of both BOCs and ILECs, AWS focuses primarily in these comments on the protections that should be established to prevent the exercise of market power by BOCs to impede competition.

AWS has a compelling interest in this proceeding because it and other unaffiliated Commercial Mobile Radio Service ("CMRS") carriers are increasingly viewed as true competitors to BOC long distance and bundled wireline/wireless services. At the same time, the BOCs wield market power over special access transport services that are crucial to AWS' and other CMRS carriers' ability to provide services to their customers. In order to deter BOCs (and ILECs) from acting on their increasingly compelling incentives to impede the development of viable CMRS carrier competition to wireline services, the Commission must establish a regulatory framework that – at the very least – includes special access performance metrics and standards such as those proposed by the Joint Competitive Industry Group ("JCIG").^{3/} The JCIG- proposed metrics will help ensure that unaffiliated CMRS carriers obtain special access services on competitive and nondiscriminatory terms. Moreover, the Commission should address special access pricing in light of the evidence that BOCs are reaping excessive rates of return.^{4/} In the absence of such regulatory safeguards, the ability of unaffiliated CMRS carriers to discipline potential BOC anticompetitive behavior is greatly hampered.^{5/}

^{3/} *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Ex Parte of Joint Competitive Industry Group at Attachment A (filed Jan. 22, 2002). AWS and several other wireless companies have recently joined the JCIG in their efforts to promote the adoption of special access performance metrics and standards. *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Ex Parte of Joint Competitive Industry Group at 1 (filed May 13, 2003). These metrics would apply to all Tier 1 ILECs.

^{4/} *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM Docket No. 10593, AT&T Petition for Rulemaking at 7-16 (filed Oct. 15, 2002).

^{5/} See, e.g., *NPRM* ¶ 32 (asking whether reliance on special access services undermines competitors' ability to discipline potential BOC anti-competitive behavior).

I. BOCs SHOULD BE CLASSIFIED AS DOMINANT CARRIERS WHEN PROVIDING INTERLATA SERVICES ON AN INTEGRATED BASIS

A. BOCs Have Increasingly Strong Incentives To Wield Their Market Power To Disadvantage Unaffiliated CMRS Carriers Competing for BOC Customers

As the Commission notes in the *NPRM*, numerous conditions have changed since the Commission adopted the *LEC Classification Order*^{6/} in which it established separate affiliate requirements to protect against the exercise of BOC market power. Virtually all of those changes make protections against the exercise of such power more necessary rather than less.^{7/} Among the most important changes is the nascent emergence of unaffiliated CMRS carriers as competitors to BOC wireline services and the proliferation of bundled wireline/wireless service offerings. The “limited, but increasing, substitution of mobile wireless service for traditional wireline service, particularly for interstate calls” identified by the Commission in this proceeding provides a strong and increasing incentive for BOCs to deny their evolving but still vulnerable competitors inputs essential to the competitors’ ability to provide competing service to consumers.^{8/} The incentive to discriminate is further heightened by the BOCs’ increasing integration of their own affiliated wireless services into their service offerings.

^{6/} See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-91, *Second Report and Order* in CC Docket No. 96-149 and *Third Report and Order* in CC Docket No. 96-61, 12 FCC Rcd. 15756 (1997) (“*LEC Classification Order*”), recon. denied, *Second Order on Reconsideration and Memorandum Opinion and Order*, 14 FCC Rcd. 10771 (1999).

^{7/} *NPRM* ¶ 8 (Among the “significant changes in the competitive landscape” since the *LEC Classification Order* are the following: (1) BOC authority to offer in-region, interLATA telecommunications services in 41 states (and the District of Columbia); (2) an increase in bundled telecommunications services offerings; (3) increased offerings of wide-mobile wireless by mobile telephony carriers; (4) limited wireless substitution for traditional wireline services; and (5) increased use of Internet applications).

^{8/} *Id.*

As the Commission has repeatedly recognized, unaffiliated CMRS carriers offer great potential as a substitute for BOC services,^{9/} but this substitution is still in the very early stages of development.^{10/} For instance, only three to five percent of wireless customers have abandoned their landline phone.^{11/} Only eleven percent of residential customers replace a “significant percentage” of wireline phone usage with wireless usage,^{12/} and only twelve percent of total minutes are carried by the wireless industry.^{13/} As small as these numbers currently are, however, CMRS carrier incursions into BOCs’ subscriber base increase every year.^{14/}

^{9/} See *id.*, n.23 (citing *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, *et al.*, *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd. 24952, 25965, ¶ 21 (2002) (*recon. pending*); *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Seventh Report, 17 FCC Rcd. 12985, 13017 (2002) (“*Seventh CMRS Competition Report*”); *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Sixth Report, 16 FCC Rcd. 13350, 13381-83 (2001) (“*Sixth CMRS Competition Report*”)). Chairman Powell has indicated that the “real competitive choices” that have been introduced through alternative platforms such as wireless “may be the best hope for residential [telephony] consumers.” Michael K. Powell, Chairman, FCC, *Digital Broadband Migration—Part II*, Speech at FCC Press Conference (Oct. 23, 2001), available at <http://www.fcc.gov/Speeches/Powell/2001/spmkp109.html>. Similarly, in his recent testimony before the Senate Commerce Committee, Chairman Powell singled out wireless carriers for “special notice” as “the most significant competition in voice.” Written Statement of Michael K. Powell, Chairman, Federal Communications Commission, “Competition Issues in the Telecommunications Industry,” before the Committee on Commerce, Science and Transportation, United States Senate, Jan. 14, 2003, at ii, available at http://www.fcc.gov/commissioners/powell/mkp_statements_2003.html

^{10/} *NPRM* at n.35 (noting that alternative platforms “may be of limited competitive significance” and citing as an example analyst estimates of the very limited percentage of customers that use their wireless phone as their only phone) (citing Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *Local Telephone Competition: Status as of June 30, 2002*, Table 11 (Dec. 2002) and *Seventh CMRS Competition Report*, 17 FCC Rcd. at 13015).

^{11/} *Seventh CMRS Competition Report*, 17 FCC Rcd. at 13015-17.

^{12/} *Id.*

^{13/} *Sixth CMRS Competition Report*, 16 FCC Rcd. at 13382 (citing a Yankee Group study).

^{14/} See Brian Bergstein, *Sprint Pushes Local Phone Service*, ASSOCIATED PRESS ONLINE, May 21, 2003 (quoting Len Lauer of Sprint PCS as predicting that the percentage of consumers that use a cell phone as their primary or only line could reach seven to nine percent in a year and exceed ten percent in two years); Robert Luke, *Bundling Is the New Mantra in Telecom*, THE ATLANTA JOURNAL CONSTITUTION, BUSINESS SECTION, Apr. 9, 2003 (“Revenue losses to U.S. wireline carriers due to the encroachment of

Although wireless carriers “offer a dynamic and burgeoning new avenue for competition in both broadband and voice communications,”^{15/} fulfillment of this competitive promise is heavily dependent upon CMRS carriers’ reasonable access to BOC special access services. As described in more detail below, because the BOCs are often the only carriers that are able to provide special access services, CMRS carriers are captive customers of their major competitors for this critical input. The BOCs can thus stifle the emerging competition provided by CMRS carriers simply by failing to provide special access services to their unaffiliated competitors on reasonable rates, terms and conditions.

Moreover, BOC anti-competitive incentives are further reinforced by BOCs’ entrance into the long distance market and their increased bundling of local/long distance services with affiliated wireless offerings.^{16/} Indeed, the BOCs have begun to blur the distinction between wireline and wireless services. For instance, SBC Communications, BellSouth Corp., and Cingular Wireless plan to launch a new bundled offering called MinuteShare that will permit

wireless and cable broadband services could exceed \$18 billion by 2010, predicts Adventis, a Boston-based telecommunications strategy firm.”).

^{15/} Written Statement of Jonathan S. Adelstein, Commissioner, Federal Communications Commission, “Health of the Telecommunications Sector: A Perspective from the Commissioners of the Federal Communications Commission,” before the Subcommittee on Telecommunications and the Internet, United States House of Representatives, Feb. 26, 2003, at 2, available at <http://www.fcc.gov/commissioners/adelstein/statements2003.html>.

^{16/} Brian Bergstein, *Sprint Pushes Local Phone Service*, ASSOCIATED PRESS ONLINE, May 21, 2003 (“Baby Bell regional phone carriers are aggressively packaging long distance with local service, high-speed Internet access, and in some cases wireless calling.”); Robert Luke, *Bundling Is the New Mantra in Telecom*, THE ATLANTA JOURNAL CONSTITUTION, Business Section, Apr. 9, 2003 (“BellSouth, battling to hang on to its long-dominant market share is firing back with its own bundles that include a buffet of services from local and long-distance calling to wireless service and high-speed DSL Internet access Bundling is critical to BellSouth . . . their revenues and profits have been shrinking . . . because consumers are substituting landline phones with wireless and broadband Internet service.”).

residential customers to share a single bucket of minutes for both their wireless and wireline phones.^{17/}

As suggested above, BOC bottleneck control over the essential special access input empowers BOCs to offer necessary transport to their wireless affiliates at rates, terms, and conditions superior to those available to unaffiliated CMRS carriers. Alternatively, the Commission recognized in the *CMRS Safeguards Order* that even if BOCs were to charge their own affiliates the same supracompetitive prices that they charge unaffiliated wireless carriers, the BOCs would not suffer any financial impact because the imposition of such prices would simply result in an intracompany transfer of revenue.^{18/} BOCs would also have the same incentives to discriminate with respect to terms and conditions other than prices – such as the quality or timing of the provision of special access services – that could substantially impact unaffiliated wireless carriers' provision of services to their customers.^{19/} Moreover, the BOCs' ability to offer bundled wireless services at lower prices or with better quality than their would-be competitors because of the provision of such preferential treatment would confer a substantial

^{17/} See Gayle Kansagor, *SBC, BellSouth, Cingular Blur Line between Wireless, Wireline Service*, TR DAILY, June 5, 2003.

^{18/} *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-192, *Report and Order*, 12 FCC Rcd. 15668, 15689-90 (1997) ("*CMRS Safeguards Order*") (internal citations omitted) (noting that an anticompetitive price squeeze can occur when "the LEC . . . raise[s] the price that it charges for interconnection to all CMRS providers (including the LEC-owned provider), forcing competing carriers either to raise their retail prices or accept a reduction in their profit margins. As a result, the LEC has a competitive advantage: if CMRS competitors raise their prices, the LEC CMRS affiliate can keep its prices low to attract greater market share, while the parent company reaps offsetting profits as the result of the higher interconnection fees. If competitors do not raise their prices, they will reap lower profits, while the LEC as a whole enjoys greater interconnection revenue.").

^{19/} *Id.* at 15689, ¶ 29 (internal citations omitted) ("[d]iscrimination can take many forms, such as providing inferior quality interconnection, providing fewer lines (thus reducing the capacity of the competing system to complete calls), delaying the fulfillment of requests for interconnection services, delaying repairs to competitors' interconnection facilities, and providing inferior quality service repairs.").

competitive advantage by both reducing the churn of BOCs' already huge customer base and unfairly boosting their ability to obtain new customers.^{20/}

Ironically, the more successful wireless carriers are in presenting a competitive threat to BOCs, the more compelling the BOCs' incentives to wield their market power in this anti-competitive fashion become.^{21/} Thus, to help fulfill the promise of inter-modal competition, the Commission must ensure that ILEC special access services are made available at reasonable levels of service quality and at reasonable rates.

B. BOCs Continue To Exert Bottleneck Control Over Essential Inputs

BOCs not only have the incentive, but also the ability to discriminate against unaffiliated CMRS carriers. CMRS carriers are heavily reliant on BOC special access services to provide their wireless services to customers. As discussed more fully below, BOCs exert virtually exclusive control over the provision of that input because of a lack of viable alternatives and thus can demand supracompetitive prices, impose discriminatory terms and conditions, or otherwise exercise their market power to disadvantage their competitors and advantage themselves and their wireless affiliates. Thus, the answer to the Commission's question of whether BOCs possess market power in access service markets is emphatically, yes.^{22/}

^{20/} For instance, the MinuteShare proposal planned by SBC Communications, BellSouth Corp., and Cingular Wireless in which customers could share a single bucket of wireline and wireless minutes is likely to present just such a threat to competing wireless carriers. See Gayle Kansagor, *SBC, BellSouth, Cingular Blur Line between Wireless, Wireline Service*, TR DAILY, June 5, 2003.

^{21/} *CMRS Safeguards Order*, 12 FCC Rcd. at 15692, ¶ 36 ("LECs and CMRS operators are increasingly likely to be direct competitors. The competitive pressure brought to bear on the local exchange market by CMRS providers could increase the incentive for LECs to engage in discriminatory and other anticompetitive practices.").

^{22/} *NPRM* ¶ 14.

1. BOC Special Access Services Are Essential to AWS Provision of CMRS Services

The Commission has already acknowledged the critical nature of the special access input to the services provided by interexchange carriers and CLECs,^{23/} and should recognize that the special access input is equally essential to CMRS carriers. CMRS carriers such as AWS utilize special access services in the same way interexchange carriers or CLECs do – to connect an end user to the carrier’s point of presence. More specifically, AWS utilizes special access services to connect mobile switching centers with cell sites where antennas and other electronic equipment establish “last mile” connections with end users. Typically, the cell sites are connected to centralized switching locations through wireline facilities purchased from BOC special access tariffs. Thus, like wireline carriers, AWS relies on special access services to perform the critical function of filling out its network and transporting traffic between centralized switching locations – called mobile switching centers – and end users.^{24/} Moreover, as CMRS carriers expand the number of cell sites and centralized cell site control facilities to meet rising consumer demand and upgrade their networks to provide broadband services, CMRS carrier reliance on BOC special access services will continue to increase.^{25/}

^{23/} *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd. 20896, ¶ 1 (2001) (“Special Access Notice”).

^{24/} AWS has provided a much fuller description of its reliance on the special access input in the *Special Access Performance Standards* and the *UNE Triennial Proceedings*. See *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Comments of AT&T Wireless Services, Inc. at 4-6 (filed Jan. 22, 2002); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Comments of AT&T Wireless Services, Inc. at 2, 23-38 (filed Apr. 5, 2002).

^{25/} See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Ex Parte of AT&T Wireless Services, Inc. (filed Jan. 7, 2003) (“AWS Jan. 7, 2003 Ex Parte”).

2. BOCs Provide the Only Viable Provisioning Option

a. Alternatives Are Not Available from Third-Parties

Third-party suppliers do not provide a viable alternative to BOC provision of special access for CMRS carriers. CMRS carriers have provided stark evidence of this reliance on BOC and other ILEC special access services. AWS, for example, estimates that more than 90 percent of its transport costs go to paying ILECs for special access facilities.^{26/} VoiceStream Wireless also has stated that it obtains approximately 96 percent of its special access transport needs from ILECs.^{27/} Sprint has noted that ILEC special access services are its largest wireless operating cost.^{28/} The level of CMRS carrier reliance on special access services is consistent with that demonstrated for wireline competitive carriers^{29/} and reflects the simple fact that, to the extent alternative suppliers are not available for wireline competitors, they are similarly not available for CMRS carriers.

The Commission itself recently confirmed the “lack of ubiquitous alternative middle mile transport” providers^{30/} and most carriers confirm that there are very few non-ILEC providers that

^{26/} *Implementation of Local Competition Provisions of the Telecom Act of 1996*, CC Docket No. 96-98, Petition for Declaratory Ruling of AT&T Wireless Services, Inc. and VoiceStream Wireless Corp., at 7 (filed Nov. 19, 2001) (“AWS/Voicestream Petition”).

^{27/} AWS/Voicestream Petition at 7.

^{28/} *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Comments of Sprint Corporation at 49 (filed Apr. 5, 2002).

^{29/} See, e.g., *id.* at 47-49; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Comments of Nextel Communications, Inc. at 4 (filed Apr. 5, 2002); Comments of Progress Telecom Corporation at 14 (filed Apr. 5, 2002) (“Indeed, if wireline carriers are impaired in the provision of telecommunications services to their wireline customers without access to transport, it is beyond doubt that they are similarly impaired in the provision of telecommunications services to their wireless customers without such access.”).

^{30/} *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, 17 FCC Rcd. 2844, Appendix B, ¶ 8 (2002).

can fulfill their transport needs. WorldCom, for example, noted that even though its policy is first “to evaluate whether it can self-provide [facilities] over its own local network,” and second to look for “another competitive carrier [that] can provide the required facilities,” more than 90 percent of its needs have been provisioned by ILECs.^{31/} Focal’s practice, similarly, is to use third-party providers whenever possible, yet the vast majority of the transport facilities it purchases are from the incumbents because “there are still no ubiquitous, reliable third-party alternatives.”^{32/}

Moreover, to the extent competitive transport providers once existed, they have fallen on hard times in recent months. In fact, many of the competitive carriers previously cited by BOCs as “significant third-party providers” are now facing severe financial difficulties or have simply disappeared from the market.^{33/} To the relatively small extent that CLECs and CMRS carriers relied on such entities for interoffice transport and loops, they have had to revert to ILEC facilities – most often from tariffed offerings instead of UNEs – avoid delay.

Thus, today, and for the foreseeable future, incumbent networks are the only truly viable option for the widespread coverage CMRS carriers need. The Commission must therefore ensure that possible BOC competitors like unaffiliated CMRS carriers have access to the

^{31/} *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Comments of WorldCom, Inc. at 9-10, n.10 (filed Jan. 22, 2002).

^{32/} *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Comments of Focal Communications Corp., Pac-West Telecomm, Inc., and US LEC Corp. at 12 (filed Jan. 22, 2002) (“Nor are competitive alternatives for transport realistically available. . . . Because third parties are not constructing ubiquitous, duplicative local transport networks, competitors will require unbundled access to incumbent LEC local transport for the foreseeable future.”).

^{33/} *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Declaration of C. Michael Pfau on Behalf of AT&T Corp. at 14-18, *appended to* Comments of AT&T Corp. on Use of Unbundled Network Elements to Provide Exchange Access Services (filed Apr. 30, 2001) (discussing market realities).

noncompetitive parts of the BOCs' networks they need to provide service to their end user customers.

b. Self-Provisioning Is Not a Realistic Alternative^{34/}

The vast record from the special access and related Commission proceedings demonstrates that, in most cases, building facilities directly to the end user's premises is neither a straightforward nor economical task.³⁵ Requiring prospective competitors to incur the extraordinary costs – both in terms of dollars and lost business – to self-provision already deployed ILEC facilities would be grossly inefficient.^{36/} As costly and wasteful as the

^{34/} See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Comments of AT&T Wireless Services, Inc. at 10-11 (filed Apr. 5, 2002); *Ex Parte of AT&T Wireless Services, Inc.* at 11 (filed Jan. 7, 2002); Comments of Nextel Communications, Inc. at 4 (filed Apr. 5, 2002); Comments of Progress Telecom Corporation at 3-4 (filed Apr. 5, 2002); *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM Docket No. 10593, AT&T Petition for Rulemaking at 16-18 (filed Oct. 15, 2002).

^{35/} For example, while Sprint makes efforts to self-supply its facilities, it still relies on "ILECs for approximately 93% of its total special access needs." *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Comments of Sprint Corp. at 4 (filed Jan. 22, 2002). Similarly, Time Warner Telecom and XO Communications also have explained that they strive to "build connections to customer locations whenever possible, [but] in some cases this is not efficient or practical." *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Comments of Time Warner Telecom and XO Communications, Inc. at 4 (filed Jan. 22, 2002). Moreover, deployment of new network facilities requires cooperation on many levels, including from localities, other carriers, and building owners. Zoning hearings often are necessary, and obtaining approvals to dig up streets to lay new fiber is far from a simple process. As a result, new construction can frequently take months or even years to complete, and most end users are unwilling to accept such delays. See, e.g., *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, An Economic and Engineering Analysis of Dr. Robert Crandall's Theoretical "Impairment" Study, appended to Opposition of AT&T Corp to Joint Petition, at Section II.B (filed June 11, 2001). See also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Reply Comments of Nextel Communications, Inc. at 2-3 (filed July 17, 2002) ("Given the ubiquity of ILEC transport facilities, the tight time frame within which new cell sites are turned up and uncertainty associated with self-provisioning of alternative transport facilities, CMRS providers by and large have come to rely on ILEC transport facilities for cell site connection to MSCs.")

^{36/} AWS has undertaken substantial efforts to attempt to reduce its dependence on BOC transport and has done so in the few instances where it is cost-effective to do so. For instance, because of the high price of BOC SONET transport, AWS is attempting to deploy alternative SONET ring transport in major metropolitan markets by leasing dark fiber on an IRU basis, purchasing optronics to light fiber, and outsourcing network management. AWS Jan. 7, 2003 Ex Parte at 11.

Commission has determined self-provisioning would be for IXC's and CLEC's, it would be vastly more so for CMRS carriers because they must deliver traffic to virtually every ILEC wire center in the CMRS service area.^{37/}

Any substantial self-provisioning would require a wireless carrier such as AWS to deploy facilities at thousands of cell sites – a feat that is simply infeasible because of the staggering costs it would impose.^{38/} Nor can microwave transport provide a real alternative to BOC special access because of serious deployment problems such as the lack of space for antennas at many cell sites and the necessity of completing the burdensome zoning proceedings required for the construction of new towers.^{39/} In addition, microwave transport presents substantial reliability and performance concerns not raised by BOC special access.^{40/} Thus, even more than for IXC's and CLEC's, requiring CMRS carriers to replicate the BOC's extensive facilities would be a phenomenal waste of resources that would seriously retard the development of CMRS as an alternative to BOC wireline services.

c. UNEs Are Not an Available Option

The Commission asks whether CMRS carriers' reliance on BOCs "for special access and/or transport [will] undermine these competitors' ability to discipline potential BOC or

^{37/} *Id.*

^{38/} *Id.* See also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Comments of AT&T Wireless Services, Inc. at 2, 23-38 (filed Apr. 5, 2002); Initial Comments of Nextel Communications, Inc. at 4 (filed Apr. 5, 2002) (As the Commission has recognized, it is "prohibitively expensive" for competing carriers to self-provision ubiquitous dedicated transmission facilities) (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 3696, 3855-56 (1999) ("UNE Remand Order")).

^{39/} AWS Jan. 7, 2003 Ex Parte at 11.

^{40/} *Id.*

independent LEC anticompetitive behavior.”^{41/} The foregoing has demonstrated that CMRS carrier reliance on special access services will undermine such efforts. The Commission also suggests that the availability of unbundled network elements and their attendant safeguards could diminish BOC power.^{42/} As AWS pointed out in the context of the Triennial Review, BOCs and other ILECs have refused to make facilities available to CMRS carriers as UNEs.^{43/} Moreover, BOCs have taken the position that CLECs may not obtain UNEs that the CLECs would use in providing alternatives to BOC special access services.^{44/} Thus, the only viable option for CMRS carriers to obtain access to necessary transport facilities is to obtain BOC special access services. The availability of UNEs imposes no limits on potential BOC abuses of market power towards unaffiliated carriers.

^{41/} *NPRM* ¶ 32.

^{42/} *Id.* ¶ 30.

^{43/} *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Comments of AT&T Wireless Services, Inc. at 2 (filed Apr. 5, 2002); see also *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Comments of VoiceStream Wireless Corp. at 4 (filed Jan. 22, 2002) (“ILECs, however, generally refuse to provide these UNEs to CMRS carriers”); Reply Comments of VoiceStream Wireless Corp. at 9 (filed Feb. 12, 2002) (“[T]he fact remains that BellSouth and other ILECs have unlawfully refused to provide UNEs to VoiceStream and other CMRS carriers.”); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Comments of Nextel Communications, Inc. at 2 (filed Apr. 5, 2002) (“ . . . ILECs uniformly have refused to provide [special access] to CMRS carriers as a UNE”); Comments of Sprint Corporation at 48 (filed Apr. 5, 2002); Comments of Progress Telecom Corporation at i (filed Apr. 5, 2002); Comments of Cellular Communications and Internet Association at 5-6 (filed Apr. 5, 2002); Comments of VoiceStream Wireless Corp. at 2 (filed Apr. 5, 2002) (“VoiceStream and other CMRS providers have documented to the Commission how ILECs have consistently refused to provide dedicated transport UNEs to them”).

^{44/} *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Comments of El Paso Networks, et al. at 30 (filed Apr. 5, 2002) (quoting *Application of Sections 251(b)(4) and 224(f)(1) of the Communications Act of 1934, as Amended, to Central Office Facilities of Incumbent Local Exchange Carriers*, CC Docket No. 01-77, Petition for Declaratory Ruling by Coalition of Competitive Fiber Providers (filed Mar. 15, 2001)); *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM Docket No. 10593, AT&T Petition for Rulemaking at 16-18 (filed Oct. 15, 2002); AWS Jan. 7, 2003 Ex Parte at 10.

3. Pricing Flexibility Has Exacerbated the Special Access Problem

Noting its adoption of pricing flexibility, the Commission asks “whether there are adequate safeguards in place, post-sunset, including existing forms of price cap regulation, that would prevent anticompetitive conduct by BOCs, including cost misallocation, unlawful discrimination, or a price squeeze.”^{45/} The answer to that question is no. The Commission has largely eviscerated price cap regulation of special access pricing through the introduction of pricing flexibility. Although intended to result in lower prices, pricing flexibility has had no restraining effect on the exercise of BOC market power. Indeed, ILECs often charge *higher* prices for special access circuits in areas in which they have obtained pricing flexibility.^{46/}

This result is not surprising given that the predicate for pricing flexibility does not equate to actual competition or a diminution of market power. The collocation-based triggers for pricing flexibility established by the Commission^{47/} certainly do not guarantee that competitive transport is available to AWS. ILECs can obtain pricing flexibility by showing that competitors have collocated in only a portion of the wire centers in an Metropolitan Statistical Area (“MSA”).^{48/} In other words, BOCs can obtain pricing flexibility even in the vast majority of

^{45/} NPRM ¶ 40 (citations omitted).

^{46/} AT&T Corp. *Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM Docket No. 10593, Comments of Special Access Reform Coalition, Macroeconomic Benefits from a Reduction in Special Access Prices (attachment) at 4 (filed June 12, 2003) (since the advent of pricing flexibility, Bell company returns on special access services have been considerable – 29.3% in 2000, 38.9% in 2001, and 39.7% in 2002); *see also* AT&T *Petition for Rulemaking* at 7-17 (filed Oct. 15, 2002).

^{47/} Pursuant to the *Pricing Flexibility Order*, incumbent LECs may obtain regulatory relief by showing that competitors have collocated in specified percentages of the incumbent’s end offices. *Access Charge Reform*, CC Docket No. 96-262, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd. 14221, ¶ 82 (1999) (“*Pricing Flexibility Order*”).

^{48/} *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Ex Parte of NewSouth Communications at 2 (filed Feb. 3, 2003) (demonstrating extremely low threshold of competitive entry required to obtain pricing flexibility, especially in rural areas).

wire centers that have no competitive alternatives at all.^{49/} A CMRS carrier, however will have cell sites throughout the MSA – not just in the most densely populated areas of the MSA – and will require transport throughout the MSA. Thus, a demonstration sufficient to warrant pricing flexibility provides precious little evidence that AWS has an alternative to the BOC's special access services for transport to AWS' cell sites.

II. NATIONAL PERFORMANCE STANDARDS AND RENEWED OVERSIGHT OF BOC SPECIAL ACCESS PRICING ARE ESSENTIAL TO THE DEVELOPMENT OF COMPETITION

The Commission asks whether dominant carrier regulation of BOCs' interexchange services is necessary or whether there may be alternative means to guard against anticompetitive behavior.^{50/} For the reasons stated above, BOCs clearly have "Bainian" market power with regard to special access services.^{51/} The ability to wield that power increases as the Section 272 safeguards sunset. The Commission has before it two proceedings for the adoption of regulations that can directly address BOC Bainian market power and stem abuses. One, recognized in the notice, is the adoption of special access performance metrics and standards. AWS supports the JCIG-proposed special access performance plan. That plan was recently modified slightly with addition of reporting requirements that would require Tier I ILECs to report performance separately for affiliated and unaffiliated CMRS carriers and affiliated and unaffiliated wireline competitors.^{52/} These requirements would greatly heighten the ability to detect and deter discriminatory conduct. With the sunset of the Section 272 affiliate requirement

^{49/} *Id.*

^{50/} *NPRM* ¶ 35.

^{51/} *Id.* at n.10.

^{52/} The Joint Competitive Industry Group proposals would apply to BOCs and Tier 1 ILECs only. *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Ex Parte of Joint Competitive Industry Group (filed May 13, 2003).

and the concomitant loss of transparency, adoption of the JCIG performance metrics becomes even more important.


The other proceeding before the Commission that can address BOC abuses of their market power over special access is the AT&T petition for rulemaking on special access rates.^{53/} This proceeding provides the Commission with an opportunity to restore reasonable pricing control over these services and prevent the BOCs from reaping supranormal profits at the expense of its captive competitors.

CONCLUSION

For the foregoing reasons, AWS requests that the Commission classify BOC and other incumbents as dominant when providing interLATA services on an integrated basis and that the Commission establish national performance metrics and standards governing the provision of special access to competitive carriers, including CMRS carriers.

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Dated: June 30, 2003

^{53/} AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM Docket No. 10593, AT&T Petition for Rulemaking (filed Oct. 15, 2002).

CERTIFICATE OF SERVICE

I, Angela Brunson, hereby certify that on this 30th day of June, 2003 an original and four copies of AT&T Wireless Services, Inc.'s Initial Comments in this proceeding were filed via hand delivery to Secretary Dortch and an electronic copy was sent via e-mail to the following:

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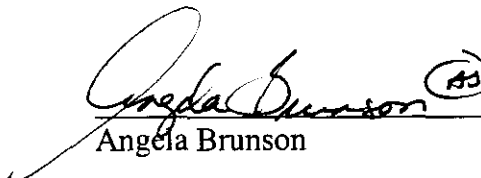
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